APPEAL NO. 022542
FILED NOVEMBER 20, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on August 26, 2002. The hearing officer determined that the appellant (claimant) did not sustain a compensable injury and that he did not have disability, although he did have the inability to obtain and retain employment for the period from March 5 through August 2, 2002.

The claimant has appealed the findings on injury and disability. Furthermore, the claimant complains of the withdrawal of an issue on whether the respondent (self-insured) waived the right to dispute compensability of the injury. The self-insured responds that the decision is correct on all appealed issues, and further that the claimant did not demonstrate good cause to add an issue. The self-insured argues that there was no evidence to support an inability to work but this is not timely made as an appeal.

DECISION

Reversed and rendered.

The claimant, who was in his late 30s, was employed in the business of aircraft repair. He described how he was injured on _____, as he lifted a battery into an aircraft and slipped in some hydraulic fluid while doing this. Thereafter, he experienced sharp back pain and reported the incident right away to a supervisor, who sent him to the company doctor. The claimant continued to complain of pain and numbness down one leg. His MRI showed bulging dics. One of the company doctors, who testified for the self-insured, conceded that while the bulging disc finding could be the result of degenerative conditions, it also could have resulted from trauma. This same doctor also agreed that an MRI would not be the best diagnostic test for identifying the source of radicular pain.

The claimant had changed his treating doctor and was unable to obtain more than routine care for his pain due to the denial of the claim by the self-insured. The claimant's supervisor testified that the claimant had been counseled the week before the hearing about tardiness and absences. However, he said that the claimant had left that meeting with the promise to do better and there was no evidence of any tardiness or personnel problem the day of the accident.

OCCURRENCE OF AN INJURY

The hearing officer erred by determining that the claimant did not have an injury, and her finding to this effect is against the great weight and preponderance of the

evidence. As we observed in Texas Workers' Compensation Commission Appeal No. 020528, decided April 16, 2002:

> While the Appeals Panel has on rare occasion observed that pain (without more) may not constitute an injury, **we observe that the experience of pain after an accident occurs is certainly a strong indicator that an injury exists**. Ascertainment of the nature and scope of the physical damage typically comes after medical treatment and evaluation. It has been held that strains, sprains, wrenches, and twists that arise out of employment, even where an employee is predisposed to such injury, are compensable. Hanover Insurance Company v. Johnson, 397 S.W.2d 904 (Tex. Civ. App.-Waco 1965, writ ref'd n.r.e.). [Emphasis added.]

Plainly, the medical records show objectively-observed muscle spasms, limited range of motion, and a diagnosis of inguinal strain, as the hearing officer acknowledges. Therefore, the hearing officer's observation in her discussion that the medical records document only "pain" and no injury is not well-taken. That there may be prior degenerative condition does not rule out an injury by way of aggravation; the employer takes the employee as he finds him. Gill v. Transamerica Insurance Company, 417 S.W.2d 720, 723 (Tex. Civ. App.-Dallas 1967, no writ). An incident may indeed cause injury where there is preexisting infirmity where no injury might result in a sound employee, and a predisposing bodily infirmity will not preclude compensation. Sowell v. Travelers Insurance Company, 374 S.W.2d 412 (Tex. 1963). We reverse the determination that the claimant did not have an injury as against the great weight and preponderance of the evidence, and render a decision that the claimant sustained an injury in the course and scope of employment on _____. Likewise, we render the decision that the claimant had disability for the period from March 5 through August 2, 2002.

RESCISSION OF AN INCLUDED ISSUE

The claimant argues that an issue regarding carrier waiver vis à vis the case of Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002) (the Downs case) was requested after the benefit review conference and added by the hearing officer, only to be rescinded four days prior to the CCH. Although the claimant's attorney recited at the beginning of the CCH that he understood that "the record" already contained his arguments for including an issue on waiver, only an August 20, 2002, rescission order was included in the record by the hearing officer. This order states that the request of the claimant is rescinded, but as the hearing officer may not "rescind" a party's request, and this order is entitled "Order Rescinding Order to Include an Additional Disputed Issue," we must interpret this as an apparent reversal of a previous determination that adding a waiver issue was well-taken.

The order recites as "good cause" for the rescission the fact that Section 409.021(a) of the 1989 Act states that the penalty for failing to contest compensability of a claim within seven days is an administrative penalty, not waiver. However, by the

time the rescission order was written, this interpretation of the law was no longer viable by virtue of the Downs case.

The carrier has argued that there was no good cause for adding the additional issue but we cannot evaluate this due to the failure of the hearing officer or parties to add pertinent documents to the record. What is apparent, however, is that the hearing officer apparently found good cause, added the issue previously, and then rescinded this issue for erroneous reasons. Because rescission of the issue on waiver was error, the hearing officer erred by not making a finding on the matter. We need not remand, however, because the Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) form in evidence recites that first written notice of injury was received by the self-insured on March 6, 2002; the TWCC-21 was filed with the Texas Workers' Compensation Commission on March 28, 2002. Because this was more than seven days, the self-insured waived the right to dispute the compensability of the injury. We reverse and render a decision, adding the issue of waiver, and then deciding that issue in accordance with the Downs case, find a waiver of the right to dispute compensability as a matter of law on the undisputed facts.

We order payment of income benefits and medical benefits in accordance with this decision

The true corporate name of the insurance carrier is **(a certified self-insured)** and the name and address of its registered agent for service of process is

(SY)
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Elaine M. Chaney
Appeals Judge

_____
Gary L. Kilgore
Appeals Judge